United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original

74-2042

United States Court of Appeals

SECOND CIRCUIT

Docket No. 74-2042

UNITED STATES OF AMERICA *ex rel.* WILLIAM WOODEN,

Petitioner-Appellant,

against

LEON J. VINCENT, Superintendent Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

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Questions Presented

1. Was the admission at trial of petitioner's prearraignment-post indictment statement to Detective Guido and an assistant district attorney harmless error where such statements dovetailed with a previously volunteered statement and where the other evidence against petitioner conclusively established his guilt?

2. Did the State trial judge properly admit at trial petitioner's prearraignment-post indictment statement to Detective Guido and an assistant District Attorney where such statements were freely and voluntarily made after the petitioner was apprised of the charges against him and knowingly waived his right to counsel?

3. Was petitioner denied his right to the effective assistance of counsel where petitioner, on the eve of trial, and in an attempt to delay the proceedings against him, insisted on proceeding *pro se* in the trial court notwithstanding the continued availability of competent and able counsel?

Statement

This in an appeal from an order of the United States District Court for the Southern District of New York dated July 15, 1974 which denied petitioner's application for a writ of habeas corpus (DUFFY, J.). On July 26, 1974, Judge Duffy granted petitioner a certificate of probable cause.

Prior History

Petitioner was convicted in the County Court, Nassau County on May 18, 1970, of the crime of Felony Murder, Manslaughter in the First Degree, Robbery in the First Degree and Larceny in the Third Degree. He was sentenced to 25 years to life for the Felony Murder, a maximum of 25 years each for Manslaughter First Degree and Robbery First Degree and a maximum of 4 years for Grand Larceny in the Third Degree to run concurrently.

Petitioner appealed the conviction to the Appellate Division, Second Department claiming, *inter alia*, that (1) the trial court's refusal to grant a change of counsel and its decision instead to allow appellant to represent himself on a charge of murder was an abuse of its discretion and denied appellant his right to the effective assistance of counsel and (2) a post-indictment statement obtained after an interview by Detective Guido and an assistant district attorney in the absence of counsel should not have been admitted at trial.

The conviction was affirmed on December 20, 1971, 38 App. Div. 2d 690. Leave to appeal to the New York Court

of Appeals was granted, and the conviction was again affirmed. 31 N Y 2d 753. Petitioner applied for certiorari to the United States Supreme Court. This petition was denied on March 19, 1973. 410 U.S. 987 (1973). Thereafter, petitioner applied for a federal writ of habeas corpus, raising the claims he had raised on direct appeal. On July 15, 1974, Judge Duffy denied his application.

Introduction

Some time around 7:00 A.M. on February 18, 1968, a Sunday morning, John Hartel, a ticket agent at the Mineola, Long Island Railroad station, was shot in the back and killed by one of three perpetrators while they were in the course of committing a robbery and larceny of the victim at the Long Island Railroad station office.

Nassau County superseding indictment number 25216 resulted from a continuing investigation and was handed up on March 12, 1968 charging Wooden, together with Willie Smith, John Banks and Ceasar Hill, Jr., with the commission of two counts of Murder, Robbery First Degree and Grand Larceny Third Degree. The three co-defendants of petitioner were apprehended shortly before the handing up of the aforementioned indictment, but Wooden took to travelling and was not apprehended until late April, 1968, when he was picked up at night at some commercial premises in Westbury, where Police had gone in answer to a burglary call. Wooden, upon his arrest, volunteered that he had participated in the robbery, but denied he did the shooting. A written confession and stenographic Question and Answer statement were thereafter taken.

I.

The question of counsel and the conduct of the trial.

A. Pre-trial proceedings

Attorney Cohn was appointed to represent the defendant after his apprehension in April, 1968. Cohn conducted the pre-trial Huntley-Miranda hearing in October, 1969 and sat through a pre-trial identification hearing with respect to one of the co-defendants (68-285, 291, 298, 303).

Attorney Charles Brown replaced Cohn's co-counsel, Mr. Corcoran, in December, 1969, after the holding of the Huntley-Miranda hearing (280, 288, *et seq.*, 298-300).*

On December 29, 1969, after the co-defendant Hill's trial and all the pre-trial hearings, the County Court fixed trial dates for the remaining co-defendants (275 *et seq.*). It was arranged that the Bank's trial would commence first, on March 2, 1970 (285); that defendant's trial would follow (281); and the Smith case would be tried last (282-283).

B. The first motion to relieve counsel—commencement of the trial—March 16, 1970

Mr. Cohn stated the defendant was not ready (288). Cohn advised the defendant told co-counsel, Mr. Brown, he was discharging Mr. Cohn; that Cohn would not be permitted to represent him on the trial or participate; and that defendant did not wish to go forward if Cohn represented him (288).

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* According to the record on appeal in *People* v. *Ceasar Hill*, 37 A D 2d 693, pp. 234-235 thereof, judicial notice of which this Court is requested to take, Mr. Brown, then of the Legal Aid Society of Nassau County, was present at an initial lineup of suspects in mid-February, 1968 in connection with this case, at which he represented a suspect named Kenneth Lewis who was indicted and later released concurrently with the handing up of the instant superseding indictment.

Cohn moved to be relieved and have new counsel assigned of defendant's own choosing or counsel that the court might choose, or of whom the defendant would approve (289). Defendant stated he could not go to trial with Cohn because they couldn't communicate and because he believed Cohn could not protect him (290).

Importantly, Wooden indicated he was satisfied with Mr. Brown and felt Brown could properly represent him at the trial and wanted Brown to remain on the case (290).

Defendant further stated he had communicated with attorney Rivers, would like him assigned or have someone else assigned of defendant's own choosing.

The court ascertained that the defendant could not afford his own lawyer (291, 303).

Attorney Cohn had represented many indigents in the past (292). The court stated the defendant did not have the right to refrain from going to trial until someone was appointed that might suit the defendant and that, further, there was no guarantee the defendant would have confidence in any new lawyer assigned (293).

The court said there were assigned to defendant two very experienced and competent counsel; that Mr. Cohn was a most experienced attorney, well-known to the courts, a leader of the Bar, with experience in murder cases, such as *Carbonaro* (see Record on Appeal, *People* v. *Carbonaro,* 21 N Y 2d 271) and other important cases (294, 302).

Mr. Brown was also described as an eminent member of the Bar (294), who at one time was one of the chief trial attorneys of the Nassau County Legal Aid Society (294) and who had been assigned to defendant for a number of months. Brown indicated he could not act as primary counsel immediately because he was not a party to prior negotiations or proceedings (290, 298) and if he had the assistance of new assigned counsel, he could act as primary counsel in a week or ten days (298).

Wooden then complained he had not seen attorney Cohn since December of 1969 and had not seen him since the previous Thursday, and that a lot had happened in the case which was unknown to Cohn (302). Wooden could not see why the case could not be adjourned another month (302).

The court reminded the defendant of Cohn's great familiarity with the overall case and his contact with the same (302-303) and the applications were denied (304).

Both counsel interrogated prospective jurors (332-54) and the case was adjourned to the following day, Tuesday, March 17, 1970.

C. March 18, 1970—the second application to relieve counsel

On March 18, 1970, the court was advised the defendant had received a letter from Robert Rivers, Esq., in response to a letter sent by the defendant (386). The Rivers letter left the matter to the court and stated that the defendant was entitled to a lawyer of his own choosing.

Mr. Cohn said the defendant had told him that morning that he was discharged; he did not want him as his lawyer, and accordingly, Cohn moved to be relieved (387).

The court once again denied the application, again setting forth it had assigned two eminently competent counsel, further commenting that there was no assurance in the Rivers letter that Rivers would be in a position to handle the case at a fixed date (387).

The defendant addressed the court claiming the court was prejudiced in all forms because there were no other negroes in the courtroom, stating he was being accused of killing a white man and judged by all white persons; that he had seen only one black individual in a prospective panel (388). The court told the defendant he had two eminently good counsel (389).

Wooden didn't agree, and reiterated Cohn did not hear about the perjury charges against two potential defense witnesses, Betty Mack and Leitha Mae Smith, until March, and did not know the sentence meted out to co-defendant Hill (389).

Cohn stated he didn't know the particular sentence given Hill, but he assumed the court sentenced that defendant on the basis of a murder conviction, since he was aware Hill had been convicted on all counts, but this had not been discussed with the defendant (390). Cohn stated he did not know when the perjury indictments had come down (390).

Cohn also reported to the court he had researched a matter in his office until 9:30 P.M. the previous night on a legal point that was in issue in this case (390). Moreover, Mr. Cohn stated he had also read the testimony given at the Hill trial by Leitha Smith and Betty Mack and he had also reread that testimony this very morning (393).

D. The third application to discharge Mr. Cohn—March 23 to March 24, 1970

In the absence of the jury and the prospective jurors, Mr. Brown advised the court he had had a conference with Wooden that morning, who indicated he wished to make some remarks to the court (479). According to Brown, the defendant felt aggrieved and was of the opinion he was not being properly represented (480).

Secondly, Brown advised the defendant said he was in a position to retain counsel of his own choosing and therefore wished to have Mr. Cohn relieved and have a reasonable opportunity to obtain counsel of defendant's own choosing (480).

At this point, defendant personally addressed the court, arguing he could not get any legal advice from his lawyers regarding the perjury of Leitha Smith and the lack of any action against Mr. Lewis with respect to certain accusa-

tions against Lewis made by these girls. In short, Wooden wanted charges pressed against the trial prosecutor based on remarks of Leitha Smith made in the course of the Hill trial (481).

In addition, Wooden wanted charges pressed against Detectives Hunter and Lazoreak, further stating he didn't think either of these two should be sitting in the courtroom since they would be witnesses for the People and should be excluded (481).

The defendant concluded, as far as he was concerned, he was still without counsel, would not have anything to do with the case, the case was lost, and Wooden took exception "to this whole thing" (482).

The court mentioned if the defendant wished to try his own case, that was his privilege, assuming, of course, he didn't wish to take Mr. Cohn's advice. But if defendant did try his own case, the court would direct that counsel sit by and advise defendant if he wished to afford himself of that opportunity (485).

With respect to the assertion that the defendant wished to retain an attorney, the court stated there was no evidence the defendant could do so, since the court had heard that the defendant's wife had visited him over the weekend and there was no indication to the court there were means to retain private counsel (483-84). The court believed this was a dilatory tactic on the part of defendant and denied the application to discharge Cohn and give defendant time to retain counsel (484).

Moreover, the court added it had nothing before it to show the defendant had the financial means to retain counsel, but, on the contrary, in the past, the indication was the defendant had no funds (485).

Thereafter, the voir dire of the jury continued, and by the end of that day juror number 12 had been sworn, following which three alternates were chosen and sworn on

Tuesday, March 24, 1970 and both sides requested that the case go over to the following morning (487-92).

The jury was then excused until the following day.

E. Defendant's request to represent himself, after the complete jury was sworn

Suddenly the defendant personally stated, ". . . under the circumstances, the way this case is going, I'll defend myself" (493).

The court, obviously taken back, said, "You'll what?" (493).

Wooden repeated he would defend himself because he felt he was forced to do it; that he considered this very greatly and would defend himself. He added the court had not given him an opportunity to really express himself, although it may have done so in a way (494).

Wooden added his counsel had expressed the hope he would take a plea in this Court, which the defendant interpreted to mean they felt he was guilty and therefore he had nothing to lose and everything to gain by self-representation (494).

Mr. Brown advised he and Mr. Cohn would exert every possible effort on defendant's behalf; they had explained to defendant, by giving him a professional view, the obstacles facing them and the possible outcome of the trial (494-95).

Mr. Brown said he told the defendant he should not defend himself and Mr. Cohn joined in Brown's remarks (495).

So, too, Cohn added, the court's denial of his various motions to be relieved had not inhibited in any way Cohn's representation of defendant (495-96).

The court addressed Wooden, again telling him his counsel was very experienced and exerted great skill in

picking the jury; that he needed counsel's skill to cope with legal questions which would necessarily arise (496-97).

Judge Spitzer advised the defendant against representing himself because he did not have the background, ability and experience to cope with the matter (496).

The judge again explained his understanding of the law saying it did not allow an indigent defendant to choose a particular lawyer (293, 496-97).

Concerning counsel's advice to defendant to take a lesser plea, the defendant was reminded practically all the cards in the case were on the table—the Hill trial was now a matter of record; counsel had a duty to analyze this and the court assumed counsel had analyzed the case for defendant (497).

Wooden disagreed once again, claiming that as far as he was concerned, his lawyers formed an opinion that he was guilty and that he would be "better off copping out" (497).

Judge Spitzer asked Wooden if he really wanted to represent himself and Wooden said he had no alternative because the court was forcing him to do it (498).

The court denied this, stating it was not forcing Wooden to do anything, and reminded Wooden he had been supplied with skilled counsel. The court told Mr. Cohn if it developed that Wooden would be permitted to try this case, the court would assign both Mr. Cohn and Mr. Brown to sit in the courtroom for the purpose of offering advice to the defendant if it was requested. The trial was then adjourned until Wednesday, March 25, 1970 (499).

F. The proceeding of Wednesday, March 25, 1970—defendant's waiver of his right to counsel

The court asked whether Wooden was insistent on trying his own case, the court stating if he did, the permission

would be granted, but defendant would have to try his own case (500); if he insisted on trying his case, counsel would not be forced upon him, but the court would assign them and request that they remain in the court to be available to him in the event he wanted to use them (500, 501).

The defendant stated to the court:

> "I will stick to my opinion. I will not use these counsel for advice, even. They have been advising me wrong for twenty-four months and I see no reason to keep with the same advice." (500).

The court insisted it have a clear answer and the defendant finally answered he wanted to try his own case (500-01).

Mr. Brown inquired as to the function or status he and Mr. Cohn would now have in the case (502-03). The court announced it was granting defendant's request to represent himself, commenting whether defendant was wise or not was for defendant to determine, the decision having been made by the defendant (503).

Cohn moved for a mistrial, rehashing the history of the matter from December, 1969 up to the present (503-05). Cohn believed Wooden could not get a fair trial if he tried the case himself (506).

The court then corrected certain of Mr. Cohn's factual remarks (507) stating that, in reality, the defendant wanted to select an assigned attorney (508-09).

The court also stated, "of course, I realize that he would rather have the choice of appointing some other counsel, but this I will not do" (511).

Defendant announced he had not seen the minutes of the Hill trial; the court asked Mr. Cohn if he went over the minutes with Wooden and Cohn stated Wooden was familiar with the nature of the evidence at that trial (511-12).

Furthermore, Cohn stated he would turn over the papers and minutes to the defendant and the defendant had a copy of the Court's Huntley hearing decision (512-13).

The trial prosecutor interjected, saying it was not until the day the trial started that defendant said he wanted other counsel. Lewis observed the defendant indicated he was satisfied with Brown, following which Brown and the defendant disagreed as to a particular matter and the defendant was no longer satisfied with Brown. The prosecutor's observation concluded with the assertion the defendant would continue to discharge any lawyer assigned to him with whom he disagreed (517).

The court then granted the defendant a reasonable adjournment from Wednesday, March 25, 1970 to the next Monday, March 30th (517).

Judge Spitzer instructed counsel they were not relieved of their assignment; they were not to force themselves upon defendant; they were to remain in court at the counsel table or just beyond, and if the defendant wished to avail himself of their services, he could do so (517-18).

So too, if counsel wished to object for some reason, it would be up to the defendant to allow them to do so (518).

G. March 30, 1970

Defendant answered he was not ready, claiming he had not enough time to read 3,100 pages (522). Conversely, the defendant then announced he was ready to proceed (522-23). Wooden stated he would take advice from his lawyers—Brown would do his speaking, but that he also wanted to speak when he thought it was necessary (523-24).

The prosecutor advised that there would not be any identification of the defendant, by photograph or by eye witnesses, at the scene of the crime (524-25).

Defendant's gears shifted to reverse; the defendant said: "I will try my case, Your Honor" (525).

> "Mr. Brown is going to give me all the legal advice I wanted. He will—well, I will withdraw that. I am going to let Mr. Brown try this case with counsel from me. He can't do anything without my permission." (525)

Wooden continued:

> "Whatever he do will be satisfactory to me. He will do through this Court, because the way this trial is going, Your Honor, I am convicted. I don't see any way to get out of this Court. This Court had me down pat. Mr. Lewis had me here. I am the only Negro sitting in this courtroom. This people come in and identify me. It's got to be me. Can't be no one else. That's my whole problem." (525)

The court stated this was not a race question and the question was not properly before it. Moreover, the court indicated it was sure the attorneys had sat down with Wooden and tried to analyze the past evidence (525).

The court once again asked Wooden if he wished to avail himself of the advice and help of the two lawyers, and the defendant answered, "yes" (525-26).

To make sure, the court then asked if Wooden wanted them to conduct the examination of witnesses. The reply was: "That I will have to decide at a later date, Your Honor" (526).

The defendant renewed his application to remove the sole remaining detective assisting the prosecutor, which was denied (526).

Wooden then asked for an extension of time to finish reading the minutes. Defendant was told he had Wednesday through Sunday for this purpose. Defendant insisted he didn't get the minutes until Thursday night and that those minutes had not been explained to him prior to that. The defendant insisted his counsel had not gone over the min-

utes with him prior to the Wednesday adjournment except for the testimony of Leitha Smith (527).

The prosecutor advised that the first 7 or 8 witnesses he intended to call were present and were all covered in the first volume of the Hill trial and since the prosecutor believed he heard Wooden say he had read through half the minutes, Lewis believed defendant had therefore read the testimony of the witnesses who would be testifying that day (527). The defendant inferentially conceded this, but argued he had done so without a law book (527).

The court directed the case proceed and if the defendant found he needed time later, the court would consider another application (527). The court asked the defendant whether he was going to conduct the entire trial himself (528).

Wooden replied:

> "Well, Your Honor, due to these circumstances, I would like to call upon Mr. Brown from time to time, or Mr. Cohn, at certain times. I hope I can conduct it by myself, but if not, I will call on them." (528)

The court again told the defendant to do whatever he wished and reiterated that Brown and Cohn were eminent members of the Bar, skilled in trial wor[illegible] etc. (528).

The prosecutor insisted on knowing if and how many of the counsel or Wooden or all of them were going to conduct the trial (528-29). Wooden stated he would conduct the trial and would look to counsel for legal advice (529).

The prosecutor opened to the jury (529-34).

At the conclusion of the People's opening the defendant requested the jury be excused (534) and then told the court he made an error when he said he was ready; that he was not ready to defend himself; that five days were not enough to read 3,100 pages of minutes.

The court again advised he had two eminent counsel who were well prepared to try the case and that they had advised the court they had discussed the case with him from time to time, or at least portions of it, and that this was nothing more than a rehash of all that previously placed on the record (536).

The jury was brought back to the courtroom and the first witness was called by the People (536).

I. Defendant's conduct during trial, summation and charge

During the course of the trial, the court attempted to aid the defendant by either framing questions for him; interposing objections; assisting defendant in the interposition of objections, allowing defendant time to peruse documents, making motions; and the like, etc. (538, 556, 557, 582, 595, 598, 612, 619, 630, 658, 686, 695, 701, 703 [voir dire reopening], 705, 750-54, 756, 758, 762, 765, 783, 818).

So, too, defendant conferred with Mr. Brown on many occasions during the course of the trial, which resulted in certain action or inaction on the part of the defendant (570, 574, 575, 585-86, 663-67, 724-25, 758-61).

Notwithstanding the court's suggestion that his attorneys should do the summing up for him, the defendant summed up, telling the jury he was innocent; that certain evidence that should have been brought out was not brought out by the People; that another individual was definitely identified as a perpetrator of the crime—indicted for it and released; that testimony against him came from one family; that there were promises made to other witnesses for their testimony; that everyone from this family who testified against him was indicted for a felony and would get leniency from the court for the testimony (765).

II.

The Huntley-Miranda hearing, October 8, 9 and 10, 1969—the defendant's confessions.

Patrolman Linwood Center and Patrolman Robert Sefton (68 *et seq.*; 228 *et seq.*) arrested the defendant on the night of April 28, 1968, on a burglary charge and brought him to the 3rd Precinct police station. They did not question the defendant, but after giving him his *Miranda* warnings, the defendant who knew he was wanted for the Mineola Railroad robbery, volunteered that he did not do the shooting, but that he had a knife.

At the stationhouse, Detective-Lieutenant Daniel Guidol advised the defendant he had been indicted for Murder with respect to the killing at the Mineola Railroad Station and Guido wished to explain to the defendant his rights (156).

Wooden interrupted Guido and told him he knew what his rights were. Guido replied he would still go over these rights with him to make sure that there was no misunderstanding (156).

Guido then advised Wooden of the Miranda warnings.

Defendant stated he understood and exclaimed, in essence, what difference did it make—he was going to get life or 60 years which was the equivalent of a life sentence (156). Wooden also said there were three in the family against him (157).

The witness then told Wooden he did not know what Wooden would get. All that Guido wanted to know was whether the defendant, knowing and understanding his rights, wished to talk now without a lawyer being present, or without the advice of a lawyer (157). Wooden again indicated in the affirmative, stated he would talk to Guido, and claimed he tried to tell the police before.

Guido told Wooden three other people had also been indicted for the Murder and they had told the police their version of what happened. Wooden asked what they said, and Guido replied that Hill and Smith both said Wooden did the shooting but Banks stated he was in a car and was not sure who did the shooting (157).

Guido asked the defendant who did the shooting. Wooden said Willie Smith did the shooting; that Smith had the gun; loaded it in the car, and he believed Smith had seven bullets with him (158).

According to Wooden, when he and his friends were at the railroad station, a man came out and tried to open a shade but could not. The man left and then came out again whereupon Wooden went into the station office to get the money, and while there he heard a shot. When Wooden came out of the office, everyone was gone so he ran to the car (158).

In this connection, Wooden stated he did not see who did the shooting but he believed it had to be Willie Smith since he was the only one who had a gun, and was playing with a gun later on that day in Jamaica (158).

Moreover, Wooden denied this holdup was his idea. He said the night before the crime, he and his friends were sitting around and talking about money (159).

The defendant recalled seeing a short, dark-skinned colored woman come into the railroad station on the morning of the crime and ask what time the next train was leaving. Wooden thought he might have answered her (159).

Guido then asked Detective Lazoreak to go over the statement with the defendant and reduce it to writing (159).

Detectives Fred Lazoreak (100 *et seq.*) and Gerald Hunter (200 *et seq.*) reduced to typewritten form the defendant's statement (People's Exhibit 37 in evidence, 852) commencing about 9 P.M. and terminating about 1:30 A.M.

Detective Daniel Lannon (192 *et seq.*) obtained certain pedigree information from the defendant for purposes of a police arrest card and Donald J. White (255 *et seq.*), a certified shorthand reporter, qualified a "Q. and A." type statement given by the defendant to an Assistant District Attorney (People's Exhibit 44 in evidence, 854).

III.

The evidence adduced at the trial.

A. The arrest of Wooden and the circumstances surrounding the taking of his confession and question and answer statement.

Patrolman Linwood Center (669-671, 675), Patrolman Robert Sefton (671-674) and Detective-Lieutenant Daniel Guido (675-686) generally reiterated their testimony at the pre-trial hearing.

Detective Fred Lazoreak (696-714) also reiterated the testimony he gave at the Huntley-Miranda hearing and identified a knife he found on February 18, 1968, near a garbage can located at the Mineola Railroad Station (ultimately marked in evidence as People's Exhibit 36) (696-700, 712-713). A voir dire was conducted (703-704) on the admissions.

On cross-examination, the witness stated he was not present at a lineup of suspects who were first picked up with respect to this case (713-714).

Detective Gerald Hunter (718-726), over objection by defendant, was permitted to testify and repeat his previous testimony given at the pre-trial Huntley-Miranda hearing (719-721).

On cross-examination (722 *et seq.*), Hunter stated he was present at a lineup held on February 20 and February 21, 1968, and was aware that James Smith, Willie Smith and

Kenny Lewis was picked out of the lineup as perpetrators of the railroad station crimes (722) having been picked out at the lineup by at least Laura Palmer and Robert Hilbert (725).

Moreover, Hunter later swore to an information in the First District Court of Nassau County (Defendant's Exhibit B (722-723, 726)) charging those three named individuals with the crimes perpetrated at the railroad station.

Hunter, however, stated he did not know then that Kenny Lewis and James Smith were related or were from the same family, but now knew that Ceasar Hill and James Smith were brothers (723-724).

On redirect examination, Hunter stated that after the first indictment was handed up, charging the initial three individuals with the crimes, the investigation continued, resulting in the release of James Smith and Kenny Lewis and a re-presentment to a Grand Jury resulting in the indictment on trial (725).

B. Testimony of the accomplice, John E. Banks.

In the absence of the jury, the court ascertained from the trial prosecutor that John Banks would be called as a witness for the People. Banks and his attorney, Irving Tennenbaum, Esq., appeared in the Court Room (616).

The attorney advised the court his client was still under indictment for the crime of Murder and related crimes, the case was still pending, was not disposed of, and Banks intended to testify against Wooden (617-618).

Assistant District Attorney Lewis then stated for the record that if Banks testified truthfully at this trial and at another one, he would be permitted to plead guilty to a Manslaughter charge; that there was no discussion as to sentence nor was there any promise made with respect to sentence (619). Banks confirmed this to the court and

the jury was then brought back into the Court Room (610; see also 649).

Banks testified (620) he was currently under indictment for Murder, Robbery and Grand Larceny stemming from the February 18, 1968, Mineola Railroad Station robbery and that he knew the defendant during February of 1968 (620).

The assistant prosecutor announced to the jury the promise made to Banks in exchange for his truthful testimony—a plea to the reduced charge of Manslaughter (621) and that his anticipated cooperation would be brought to the attention of the sentencing judge at the time of sentence (649).

Banks further testified regarding the comings and goings of the defendant and co-defendants from and to the premises of Leitha Smith and Betty Mack, 219 Stewart Avenue, Hempstead, on February 17, 1968, through the early morning hours of February 18, 1968.

The accomplice also testified how the defendant, himself, and the other co-defendants planned the robbery while driving in the witness' car; how they acquired the weapon used, and how they rehearsed the route driving to and from the Mineola Railroad Station (627-636, 642-645).

Banks, on the morning of the crime, drove into Mineola past the railroad station, parked the automobile near a hospital entrance, and his three friends left the car (636).

The trial prosecutor then asked the witness what if anything happened after that and Banks stated he dozed off and went to sleep (637).

The witness then volunteered:

> "The next thing I know, Willie and Ceasar tearing the door off my car almost and saying, 'Let's go' and said, 'Woodie shot a man.'" (637)

The defendant immediately moved for a mistrial, but the court struck the volunteered statement from the record and instructed the jury to disregard the statement in its entirety, telling them they were not to be influenced in any way, shape or form by any alleged statement made by either Smith or Hill (637-638).

Banks then testified Wooden returned to the car shortly after Smith and Hill. The witness then drove the vehicle to the city (636-639).

A conversation between the defendant and Hill ensued. Hill asked the defendant whether he shot the man and the defendant said, ". . . he didn't know. He shot at him." (639).

The defendant gave Hill some money to give to the witness (639) and after being in the city, the four drove back to Jamaica where they went to Mary Jones' home. The defendant passed around to each of the three men $5.00 apiece in dimes (640).

The four remained the morning and departed again in the witness' car. The defendant, Wooden, was dropped at the Jamaica train station and the witness then drove Smith and Hill to Hempstead (641).

On the following Friday, the witness and Wooden went to Boston and remained there for about two weeks at the conclusion of which Banks himself came back to Nassau County (641-642).

Banks further testified that on February 18, 1968, the defendant had a bushy hairdo and had hair on his face (642).

On cross-examination, Banks admitted that he was indicted with Hill and Smith for these crimes but denied he was promised any specific sentence for his testimony (646-653, 667-668).

C. The ladies of 219 Stewart Avenue, Hempstead.

Betty Ann Mack (577 *et seq.*) and Leitha Smith (591 *et seq.*) were both called as witnesses against the defendant, Wooden. They had previously testified at the trial of the co-defendant, Ceasar Hill (*People* v. *Hill*, 37 App. Div. 2d 693).

These two young ladies were indicted by a Nassau County Grand Jury subsequent to the Hill trial under Indictment No. 28, 489 and No. 28, 490, both dated January 6, 1970, charging them with the crime of Perjury committed during the trial of Ceasar Hill (394-395). The perjuries alleged were not committed before the Grand Jury which indicted the defendant and Hill (374, 394). The court produced the original indictment with respect to these two girls (394).

Betty Mack was charged with having lied at the Hill trial in that she denied seeing Hill on the day of the crime and also falsely testified she had not seen Ceasar Hill before or after the death of one John Hartel.

The Smith indictment charged she falsely testified at the Hill trial that she did not remember or know of certain incidents concerning Hill and his co-defendants occurring before and after the death of John Hartel, and that she further falsely testified she had seen Hill with a toy gun in his hand.

Betty Ann Mack appeared in court with her attorney, Anthony Correri, Esq. (573). The prosecutor advised he had represented to the witness and her attorney that anything she might testify to on this trial would not be used against her in the perjury proceedings then pending against her. Correri indicated he told his client her cooperation might possibly be considered by the court should she be subsequently adjudicated (575). No other promises were made to the witness (576).

The jury returned and Miss Mack identified the defendant in the Court Room (577-578). She also knew Leitha Smith who was the sister of the co-defendant, Willie Smith (578). Willie used to be the witness' boyfriend and was the father of her baby (579).

The witness recalled seeing the defendant and co-defendants at Leitha's house in Hempstead on the evening of February 17, 1968, and their sleeping over in the home and leaving in the early morning hours of February 18, 1968 (579-582).

The prosecutor turned over to the defendant three statements of the witness, a 43 page Question and Answer statement and Grand Jury testimony of the witness (583-584). The defendant stated he had no questions to ask of the witness (584).

In the absence of the jury and at the court's suggestion, the defendant conferred with Mr. Brown and then moved for a mistrial on the ground that the prosecutor knew the witness was incapable of testifying truthfully. In addition, the defendant said he would not bring this out to the jury (re: the perjury charge) but nevertheless moved for a mistrial (585-586).

Leitha Smith (591 *et seq.*) was called upon to testify. Prior thereto in the absence of the jury, her attorney, Henry Maccaro, Esq., appeared with her (586-588).

The defendant objected to the witness being sworn on the grounds that she could not be believed (again in reference to the pending perjury charge—586-587).

The prosecutor then advised he made the same representation to Miss Smith as he had made to Miss Mack (588-589). Miss Smith had seen the defendant prior to February, 1968, and identified him in the Court Room (591-592). She further informed the court and jury that Ceasar Hill was her cousin and Willie Smith her brother (592).

On the day before the Mineola Railroad Station incident, Betty Mack, the defendant, Hill, Smith and Banks were at her Hempstead home (592-593).

Sometime during the week prior to Saturday, she heard the defendant, Wooden, say to Banks that he had been planning a job for a long time, but he never did say what job, and that the job was supposed to be worth about $4,000 (592-593, 595-598). She heard the amount of $4,000 mentioned by the defendant during a card game in a conversation on the Saturday prior to the incident (598-600).

The witness did not remember if they returned or stayed at the house upon their return but her recollection was refreshed by resorting to her Grand Jury testimony (600-602). She did not see the men leave early that morning (602).

On cross-examination, Miss Mack was asked if she ever told a lie under oath and she replied, not that she knew of, ". . . but they say I lied, so I guess I did" (603).

On re-direct examination, it was elicited from the witness that she was currently under indictment for perjury (603). There were no further questions of the witness (607).

Bonny Edwards (609 *et seq.*) testified she was the sister of Willie Smith, the cousin of Ceasar Hill, and knew both Banks and the defendant (609-610).

In February of 1968, she lived at 219 Stewart Avenue in Hempstead and she recalled an incident at the railroad station during that month and the Saturday immediately before the incident (610).

On that Saturday afternoon, the defendant, Banks and Smith, as well as Leitha and Betty, were present at her house (610-611). She heard the defendant telling Banks to hurry up and get his hair fixed since they had a job to do (611).

On cross-examination, the defendant brought out that the witness, in a prior Question and Answer statement given to the District Attorney's office, denied there had been a discussion of a job or doing a job (612).

On re-direct examination, the witness said part of her former statement was true and part was not true (613-615).

Miss Edwards stated she lied at headquarters when the statement was given because she was frightened and did not know if her brother was involved (616).

D. Witnesses at the railroad station

Paul Fitzgerald (536 *et seq.*) and Robert W. Hilbert (540 *et seq.*), Long Island Railroad employees, testified that on Saturday, February 18, 1968, shortly after 6 A.M. they arrived at the Mineola Railroad Station where they saw three colored men inside the stationhouse (536-537). The witnesses boarded a train within 25 or 30 minutes after their arrivals and observed the three men remain at the stationhouse (538, 540-542). Hilbert could not identify anyone in the Court Room as the men he had observed at the station (542).

On cross-examination, Mr. Fitzgerald stated he had not previously identified anyone at a lineup (539-540) but Hilbert had previously identified Ken Lewis, James Smith, Caesar Hill and Willie Smith during an earlier lineup (544-545).

Theophilus Jones (546 *et seq.*), porter at the Mineola Railroad Station on February 18, 1968, added that while upstairs in the stationhouse changing his clothes, he heard some noises and thereafter observed the victim fall to the ground in the street (546-548).

Laura Palmer (714 *et seq.*) testified that on the morning in question, at about 6:40 A.M., she went to the Mineola Railroad Station, saw three young colored men, and asked one of them whether or not the train had left. She was told it had left and she departed (714-715).

On cross-examination, the defendant elicited from her that she had previously picked out James Smith at a previous lineup as being one of the perpetrators (716-717).

E. The medical testimony

Dr. Daniel C. McCarthy (550 *et seq.*), the Deputy Medical Examiner of Nassau County, performed the autopsy upon the victim on February 18, 1968, and in his opinion, the cause of death was the result of a massive hemothorax on the left side due to a penetrating gunshot wound of the back and left lung (551-553).

F. The murder gun and ballistics

William Holley, a cabdriver, whose nickname was "Devil" (657-659, 662), under indictment for Criminally Possessing a Dangerous Weapon, which charge arose out of this homicide investigation (654), was promised (if he truthfully testified in this trial) that he would be permitted to plead guilty to Possession of the weapon as a Misdemeanor (654-655). The jury was made aware of this (658).

Holley testified (657 *et seq.*) that on February 18, 1968, he had a gun at his home, which he unloaded and left on the top of his dresser together with loose cartridges (659-661) and did not discover this weapon missing until three or four days later (661).

Holley identified People's Exhibit 12 for identification as his gun, recognizing its white handle and overall color and the weapon was admitted into evidence (600-661).

G. Other evidence with respect to defendant and crimes charged

Robert E. Swank (567 *et seq.*), a Long Island Railroad auditor, testified that his audit of the Mineola Long Island Railroad Station on February 18, 1968, revealed the sum of $484 in cash was missing, which partially consisted of four rolls of dimes worth $5 each (567-571).

Mary Jones (687-689) testified that in February of 1968, she resided in Jamaica, Queens, and on the morning of February 18, 1968, at about 8:45 A.M., Banks, Smith and Hill, and a man named Woody, came to her home. She did not see Woody in the court room (687), but described him as having a bushy head of hair—an Afro haircut—heavy beard and eyebrows and mustache (687-688). While there, the four men chipped in dimes and single dollar bills to buy food and drink (688).

Dorothy Greene (690 *et seq.*) testified she resided in Boston during February of 1968. The defendant and Banks came to her home on a Friday towards the end of that month (690-691) remained with her for a little over a week, and departed apparently because she had a conversation with the defendant in which Wooden stated he had shot someone (691). The witness then told the defendant and Banks to leave her house (691).

On cross-examination, the defendant brought out that in a prior statement given by the witness to the police in April, 1968, she had stated Wooden told her he was involved in a killing—a man was shot, but Wooden did not then say he shot the man (694).

On re-direct and re-cross-examination, the witness insisted her prior statement was incorrect and that her testimony on trial was the correct version.

Opinion Below

After reviewing the evidence against petitioner, Judge Duffy held that petitioner's post indictment statements to Detective Guido to the assistant district attorney were simply "icing on the cake" in view of the other evidence against the defendant.

Insofar as petitioner claimed that the admission of his post indictment, pre-arraignment statements violated his

right to counsel under the Sixth Amendment, Judge Duffy rejected petitioner's claim that no waiver of the right to counsel can be accomplished after the initiation of criminal proceedings. The District Court observed that in the real world, governmental anti-criminal action begin when the defendant is first detained and that throughout the criminal process, we have a blending of the rights guaranteed by the Fifth and Sixth Amendment. The Court found that petitioner was offered counsel and advised of his right to remain silent at least four times. The Court found that petitioner knowingly and consciously rejected the aid of a lawyer and that there was no error in admitting his post indictment statements.

The District Court also found without merit petitioner's claim that his conviction was in violation of the Sixth Amendment since he was not permitted to choose his own counsel. Judge Duffy observed that petitioner never contested the assignment of Mr. Brown, one of his two court appointed counsel. Moreover, Judge Duffy found petitioner's attack on Mr. Cohen without merit. Cohen had represented the petitioner in the Huntley-Miranda hearing and did a creditable job. The District Court found the complaints against him trivial in nature.

The District Court denied petitioner's application for a writ of habeas corpus.

POINT I

Petitioner's conviction was a certainty without the challenged statements made to Detective Guido and Assistant District Attorney Lewis in view of his prior volunteered admission and the other evidence against him.

A. The unchallenged evidence at trial

Even assuming *arguendo* only that it was error to admit petitioner's post-indictment statements to Detective Guido

and Assistant District Attorney Lewis that he had participated in the robbery, had not done the shooting but had had a knife, as the District Court observed, such statements were "icing on the cake" and any error in their introduction was completely harmless. *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *U.S. ex rel Moore* v. *Follette*, 425 F 2d 925 (2d Cir. 1970).

In fact, as to petitioner's conviction for manslaughter, his statements were exculpatory and certainly not even relevant to his conviction on that charge. As for the other counts of the indictment, petitioner had volunteered essentially the same information to Patrolman Sefton upon his arrest on an unrelated burglary charge, petitioner's accomplice Banks, directly implicated him and petitioner had confessed his participation in the incident to the disinterested witness, Dorothy Green. In addition there was the testimony of Leitha Smith and Bonny Edwards concerning a "job" petitioner had been planning. Under these circumstances, it is clear that petitioner's conviction would have been a certainty even without the challenged statements. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967).

Patrolman Robert Sefton testified that he arrested the petitioner at the A to Z Construction Company on April 28, 1968 on a burglary charge. Upon his arrest, both he and Patrolman Gunter advised the defendant that he did not have to say anything, that anything he said could be used against him in a court of law, that he was entitled to an attorney and that if he could not afford one, one would be provided to him (228-230). Neither Patrolman Sefton nor Patrolman Gunter asked the petitioner any questions. Petitioner knew he was wanted for the robbery at the railroad station and after the *Miranda* warnings, spontaneously spoke:

> "With that Wooden said, 'I was going to give myself up. I was in Florida, down at the track'. He

said, 'I didn't shoot him. I had the knife. I can prove it. It is in my jacket behind the lockers in the building'." (230)

Patrolman Sefton reiterated that he never asked the defendant any question. Similarly, Patrolman Gunter did not ask the defendant any questions (68-71, 231). Justice Spitzer obviously credited this testimony of the patrolman and held at the conclusion of the hearing that petitioner volunteered the testimony that he was going to give himself up anyway (44).* This finding is unchallenged and is, in any event, presumptively, correct here. 28 U.S.C. 2254(d). Since petitioner volunteered this statement, it was clearly admissible at trial (673).**

In addition to this important admission to Patrolman Sefton, John Banks testified regarding the comings and goings of the petitioner and the other accomplices from and to the premises of Leitha Smith and Betty Mack at 219 Stewart Avenue, Hempstead on February 17, 1968 through the early morning hours of February 18, 1968. He explained how the petitioner and the other co-defendants planned the robbery while driving in his car, how they acquired the

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* The finding that petitioner volunteered this statement to the patrolman was further buttressed by the testimony of Detective Daniel Guido (157). Detective Guido related that the petitioner told him that he had tried to call the police to surrender. Petitioner's wife had given him the name of Detective Hunter and petitioner told Detective Guido that he had called and tried to reach Hunter three times.

** The admissibility of Patrolman Sefton's testimony was unchallenged in the New York Courts. As petitioner concedes (appellant's brief, p. 41) and as this Court has made clear, such wholly volunteered statements do not come within the holding of *Massiah* v. *United States*, 377 U.S. 201 (1964). *United States* v. *Gaynor*, 472 F. 2d 899 (2d Cir. 1973); *United States* v. *Maxwell*, 383 F. 2d 437 (2d Cir. 1967), *cert. den.*, 389 U.S. 1051 (1968); *United States* v. *Accardi*, 342 F. 2d 697 (2d Cir. 1965), *cert. den.*, 382 U.S. 954 (1965).

weapon used, and how they rehearsed the route driving to and from the Mineola Railroad Station (627-636, 642-645).

On the morning of the crimes Banks drove to Mineola, past the Mineola Railroad Station, parked the automobile near a hospital entrance and his three friends got out (636). He dozed off and went to sleep (637). Smith and Hill returned to the car almost tearing off the door (637). Wooden returned to the car shortly after Smith and Hill. Hill asked whether he shot the man and the defendant said " . . . he didn't know. He shot at him." (639).

They subsequently went to Mary Jones' home where petitioner passed around to each of the three men $5.00 apiece in dimes (639-640). On the following Friday, Banks and petitioner went to Boston and remained there for about two weeks at the conclusion of which Banks came back to Nassau County (641-642).

Importantly, Banks added that on February 18, 1968, the defendant had a bushy hairdo and had hair on his face (642).

Leitha Mae Smith and Bonny Edwards corroborated Banks' testimony.* Leitha Smith testified that the petitioner, Hill, Smith and Banks were at her Hempstead home the day before the killing. That afternoon, petitioner was saying that he had planned a job for a long time (594). Earlier in the week she had similarly heard petitioner say to Banks that he had been planning a job for a long time

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* Petitioner argues that under New York Law, corroboration of Banks' testimony was necessary to render it admissible. However, the corroboration of an accomplice's testimony is not constitutionally required, such a claim is not cognizable in federal habeas corpus and petitioner would have to raise such a claim in the New York Courts. In any event, petitioner's argument is without merit since there was ample corroboration of Banks' testimony under New York Law. *People* v. *Leo*, 23 NY2d 556, 297 NYS 2d 937, *cert. den.*, 395 US 962; *People* v. *Brown*, 30 AD2d 279, 291 NYS 2d 573.

that was worth $400 (592-598). Bonny Edwards testified that petitioner and his accomplices were at her home the day before the killing and she heard petitioner tell Banks to hurry up and get his hair fixed since they had a job to do (611).

Mary Jones testified that in the morning of February 18, 1968, a man named Woody with an Afro haircult, heavy beard and eyebrows and a mustache came to her home at about 8:45 A.M. While there, the four men chipped in dimes, and single dollar bills to buy food and drink (687-689). Robert Swank a Long Island Railroad auditor had testified that his audit of the Mineola Station on February 18, 1968 indicated that $484 in cash was missing, partially consisting of four rolls of dimes worth $5 each.

Finally and most importantly Dorothy Greene testified that she resided in Boston during February of 1968. Petitioner and Banks came to her home on a Friday towards the end of that month. She testified that Wooden stated he had shot someone* (691).

In short, there was more than ample testimony without the challenged statements to Detective Guido and Assistant District Attorney Lewis to convict petitioner of felony murder, manslaughter, robbery and grand larceny. Additionally, it cannot be disputed that this other testimony was credited by the jury since petitioner's own statement exculpated him from the shooting and yet the jury convicted him of Manslaughter in the First Degree.

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* Insofar as petitioner quotes from the brief of the Nassau County District Attorney in the New York Court of Appeals in an attempt to demonstrate that there was insufficient evidence to convict petitioner without his statement, he has fallen short of the mark. The District Attorney was simply reviewing the evidence at the time of the Grand Jury proceedings when it was unknown that at least Banks and Dorothy Green would testify. In any event, this Court has an independent obligation to canvass the record. *Young* v. *United States*, 315 U.S. 257, 258 (1942).

B—The challenged statements to Detective Guido and Assistant District Attorney Lewis.

Detective Guido's testimony and the question and answer statements were independently admissible at trial, notwithstanding petitioner's prior admissions to Patrolman Sefton, and petitioner's reliance on *U.S. ex rel. Lopez* v. *Zelker*, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd.* 465 F. 2d 1405 (2d Cir.), *cert. den.* 409 U.S. 1049 (1972) is misplaced. Prior to any questioning by Detective Guido, petitioner was fully and completely apprised of his right to have an attorney present and of the fact that an indictment had been handed down accusing him of murder. Unlike the petitioner in *Lopez*, petitioner, before speaking to Detective Guido, was *informed* he was under *indictment* for murder. Petitioner clearly appreciated he was under no obligation to speak, and as Judge Duffy observed, he had been apprised of his right to have an attorney present at least four times. Armed with this knowledge and appreciating that he had a right to have an attorney present, petitioner stated that he was present at the robbery although he denied that he personally had done the shooting as related by his accomplices. Under these circumstances, Detective Guido properly testified to petitioner's statements to him at the stationhouse.

Petitioner, in this Court, is arguing for an extension of *Massiah* and *Lopez* and is asking this Court to hold that the standard required for a valid waiver of the Sixth Amendment right to counsel at trial is also required for a waiver of that right at any time after indictment. However, petitioner has cited no authority in this Circuit for such an extension of *Massiah* and notwithstanding petitioner's attempts to equate himself with a defendant who is already on trial or pleading guilty to an indictment, in point of fact, when petitioner freely and voluntarily spoke to Detective Guido, he was neither on trial nor pleading guilty, but was merely reciting the events that transpired on

February 18, 1968.* He was not admitting his guilt nor was he waiving any legal defenses to the charges against him.

The Supreme Court has never held that rights under *Massiah* may not be waived. Neither *Massiah* nor *McLeod* v. *Ohio*, 381 U.S. 356 (1965), applying *Massiah* to the States, deals with waiver, nor, under the facts of those cases, could they. Even *United States ex rel. O'Connor* v. *New Jersey*, 405 F 2d 632 (3rd Cir 1969), *cert. den.*, 395 U.S. 923, while holding "that *Massiah* commands an absolute right to counsel after indictment, thereby vitiating the validity of all oral communications between the defendant and the police made in the absence of counsel" also hold that "a clear, explicit, and intelligent waiver may legitimate interorgation without counsel following indictment." (405 F 2d at 636).

Petitioner erroneously assumes that the guarantee of the Sixth Amendment is in some sense immutable and that such guarantee has no relation to the particular context in which it arises. Such an argument ignores the fact that the Sixth Amendment, like other amendments, may not be analyzed in a vacuum but must be considered in relation to a particular factual situation. Thus, although the Supreme Court has held the right to counsel to be retroactive during trial and sentence, the Court has refused to hold the right to counsel at post indictment lineups retroactive as well, *Stovall* v. *Denno*, 388 U.S. 293, 299 (1967):

> "It must be recognized, however, that unlike cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the

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* Insofar as petitioner is arguing for an extension of *Massiah*, it is questionable whether such a new ruling is proper on collateral attack, especially where the United States Supreme Court has denied petitioner certiorari on the same claim raised and where the voluntariness of the admissions at bar are unquestioned.

absence of counsel with scrupulous fairness and without prejudice to the accused at trial . . . [T]he certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application . . ."

Moreover, the Supreme Court has just recently held that an indigent defendant has no right to counsel in pursuing a permissive appeal. *Ross* v. *Moffit*, 42 U.S.L. Week, 4940 (June 17, 1974). Finally the Supreme Court in *Tucker* v. *Michigan*, 42 U.S.L. Week, 4887 (June 10, 1974), recognized that a trial is after all a search for the truth and that absent coercive tactics, admissions made by a defendant are admissible notwithstanding an absence of *Miranda* warnings (42 U.S.L. Week at 4892).*

Finally, even if it is assumed *arguendo* as petitioner argues in his brief at bar that the right to counsel under the Fifth and Sixth Amendments are different guarantees, it does not follow that the guarantees are wholly unrelated. Accordingly, a defendant who appreciates that he is under indictment and who clearly understands that he is entitled to the presence of an attorney waives not only his Fifth but his Sixth Amendment rights.

"*Massiah* and *McLeod* must be read in light of the Supreme Court's subsequent decision in *Miranda* v.

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* Petitioner argues that *Tucker* stands for the proposition that the Fifth and Sixth amendments are unrelated and that although a defendant may waive his Fifth Amendment rights he cannot waive his Sixth Amendment rights except under a much more restrictive standard. However, the Supreme Court in Tucker did not discuss waiver under the Sixth Amendment and it is clear from *Stovall* and *Moffitt* that the specific guarantees of the Sixth Amendment vary in relation to the stage of the proceedings against the defendant.

> *Arizona*, 384 U.S. 436, 475 . . . which expressly recognized the validity of a knowing and voluntary waiver of rights during the 'critical state' of custodial interrogation . . . As *Miranda* and *Escobedo* clearly indicate, formal indictment is no longer the determinative event upon which constitutional safeguards hinge. By the same token, formal indictment does not absolutize constitutional rights or inexorably rigidify adversary postures. The crucial feature of both *Massiah* and *McLeod* was the deliberate acquisition of information by police from a suspect under circumstances preventing his effective exercise or waiver of his rights to counsel at a time when those rights had clearly attached by virtue of his formal indictment." *United States* v. *Crisp*, 435 F 2d 354, 3548 (7th Cir. 1970).

As this Court succinctly stated in *United States* v. *Drummond*, 354 F 2d 132, 150 (2d Cir. 1965) (*en banc*), *cert. den.* 384 U.S. 1013 (1966):

> "We are not prepared to hold that Drummond's willingness to go on 'spilling the beans' was a waiver of some of his rights but not others. The Fifth and Sixth Amendments may be designed to protect quite different values but in concrete situations they may often provide precisely the same protection which can be waived in precisely the same way . . . Drummond could have refused to talk . . .; he would have been protected in such a refusal by the Fifth and Sixth Amendments. But when he *did* elect to speak, his rights under both Amendments were waived."

In sum, petitioner, in the absence of any questioning, volunteered his statements to Patrolman Sefton. Detective Guido's testimony and the question and answer statement were thus cumulative. In any event, the challenged testimony was admissible since petitioner waived his right to counsel under the Sixth Amendment prior to any questioning.

POINT II

Petitioner was assigned able and competent counsel to represent him at trial and the state court's refusal to replace counsel did not deprive him of any constitutional right.

Petitioner argues that one of his appointed trial counsel, Irving Cohn, Esq., was not prepared to try his case, that the judge did not make sufficient inquiry into petitioner's allegation that counsel was unprepared, and that under these circumstances he did not effectively wa'ye his right to counsel. However, petitioner had ample opportunity to establish his allegation that counsel was unprepared. He was unable to do so because the sole reason for his request for a change of counsel was his desire to delay the proceedings against him. The trial court recognized this tactic for what it was and petitioner knowingly waived his right to the assistance of counsel at trial.

It is well established that trial judge need not appoint other counsel unless good cause is shown. *U.S. ex rel. Jackson* v. *Follette*, 425 F 2d 257 (2d Cir. 1970); *U.S.* v. *Gutterman*, 147 F. 2d 540, 542 (2d Cir.). The issue to be determined is where a claim is made that counsel should have been replaced is whether the trial judge abused his discretion in light of the reasons presented to the trial at the time the request was made. See *U.S. ex rel. Jackson* v. *Follette, supra; Lengar* v. *Sarafite*, 376 U.S. 575 (1964); *U.S. ex rel. Baskerville* v. *Deegan*, 427 F. 2d 714 (2d Cir. 1970), *cert. den.*, 400 U.S. 928 (1970).

Viewing the trial record herein in light of these standards it is clear that petitioner was not entitled to the appointment of new counsel on the eve of his trial. Mr. Cohn had represented the petitioner for over two years. Yet the petitioner's request to have him discharged was not made until the morning of trial. Mr. Cohen conducted a *Huntley-Miranda* hearing on behalf of the petitioner during this

time. The trial judge knew Mr. Cohen to be an able and experienced criminal lawyer. Petitioner's attempt to have him replaced was just an attempt to interfere with and delay his trial. Additionally, petitioner was assigned a second counsel, Mr. Brown, to assist Mr. Cohn and petitioner indicated to the court that Mr. Brown was satisfactory.

Petitioner attempts to point to a number of areas where Mr. Cohn's representation was allegedly lacking, but upon examination, his complaints are without merit and utterly fail to establish a claim of ineffective assistance of counsel which would have reduced his trial to a sham or mockery of justice. *U.S. ex rel. Crispen* v. *Mancusi*, 448 F 2d 22s (2d Cir. 1971).

Thus petitioner relies on the following to document his indictment or assault on the integrity and reputation of assigned counsel:

(1) He did not read the entire trial transcript of the Hill trial.

(2) He did not personally visit petitioner often enough in jail.

(3) He was not privy to the plea bargaining in behalf of Banks, a co-defendant.

(4) Wooden learned before his assigned attorney about a perjury indictment against Betty Mack and Leitha Smith as a result of their testimony in the Hill trial.

Insofar as petitioner argues that Mr. Cohn did not read the entire Hill record, he fails to point out what Mr. Cohn would have ascertained from that record that would have improved petitioner's case or added to Mr. Cohn's already appreciable knowledge of petitioner's case. It must be remembered that trial counsel sat through the identification hearing in the Hill case that included the eyewitnesses to the murder, Mrs. Laura Palmer, Robert Hilbert, Theo-

philus Jones and Paul Fitzgerald. Also testifying were Deputy Chief Inspector John Cummings, Detective-Lieutenant George Maher, Robbery, Detective Gerald Hunter, Homicide, Detective Daniel Lannon, Robbery. Eight witnesses testified at the Hill hearing about the murder, the description of the murder, the murderers, the time, place, and, in the case of the eyewitnesses, their ability or lack of it to make a positive identification (303-304).

A second defendant, John Banks, also demanded and separately received a confession hearing which Cohn also attended. His appearance is noted at the outset of the trial record in the Banks hearing.

This veteran trial lawyer knew from his initial contacts with the case that it was useless to dispute before a judge and jury that a robbery and murder had taken place. Long experience including the investigation and preparation of a defense in numerous other murder prosecutions suggested the weakness in this case, if there was a weakness from the trial point of view, would be identification. It is clear that by attending the identification hearings in the case of Hill and, at a different time, the confession hearing to Banks, Cohn performed a useful function for his client. They were, after all, the only hearings held before Wooden's pre-trial confession hearings commenced. The Hill-Banks hearings opened up the People's case almost in its entirety for Cohn before the hearing on Wooden's confession commenced.

Finally, Cohn represented Wooden at the combined Huntley-Miranda hearings on October 8, 9, and 10, 1969, in the Nassau County Court before Judge Spitzer. There were five police witnesses who testified, namely Patrolmen Gunter and Sefton who arrested Wooden the night of April 28, 1968, for a separate burglary about two months after the murder. Detective-Lieutenant Daniel Guido, the Commanding Officer of the Homicide Squad, was in charge

of the investigation, and he was the principal witness. He testified to the circumstances of the confession, and was corroborated by Detectives Lazorcak, Hunter, Lannon and the stenographer, Donald White.

When the actual trial commenced on March 16, 1970, Cohn had already been through three extensive pre-trial hearings conducted in behalf of Hill, Banks and his own client exploring the critical areas of the case: identification and confession. He knew the four eyewitnesses, Mrs. Laura Palmer, Robert Hilbert, Paul Fitzgerald and Theophilus Jones, could not identify his client. Moreover, he knew precisely the extent, effect and impact of their testimony. Furthermore, trial counsel knew exactly the details that led to the confession including all of the surrounding circumstances. To argue that Cohn was unprepared is contrary to the facts.

Petitioner also argued in the District court that Mr. Cohn had not visited with him for three months prior to the trial. However, such an allegation does not establish an ineffective assistance of counsel claim. Although it might have been comforting for petitioner to see Mr. Cohn, petitioner does not allege what petitioner had to tell him that would have affected the strategy at trial and such an allegation does not prove counsel was not prepared to undertake his defense.

Petitioner also claims that Cohn was incompetent because he was not privy to the negotiations between the District Attorney and Banks' lawyers. Obviously, Cohn was not privy to these negotiations since the District Attorney was hoping Banks would testify against his client.

Finally, as for petitioner's argument that Cohn was incompetent because Wooden learned of the perjury indictments against Leitha Mae Smith and Betty Mack, before Cohn did, this too, fails to establish ineffectiveness of

counsel. This fact had no bearing on Cohn's readiness to go to trial, and the implications of these indictments in regard to Wooden were thoroughly explored by Mr. Cohn and Mr. Brown, co-counsel, and every attempt was made before trial commenced to use these indictments to petitioner's advantage.

In short, petitioner's claims regarding Mr. Cohn were and are without foundation. By willfully rejecting his assistance and Mr. Brown's, petitioner intelligently waived his right to counsel. *U.S.* v. *Fortura*, 464 F. 2d 1202 (2d Cir.) *cert. den.* 409 U.S. 980 (1972); U.S. ex rel. *Jones* v. *McKendrick*, —— F. Supp. ——, (E.D.N.Y. 1969) (68 Civ. 664, *Bartels*, J.), (*aff'd in open court*, —— F. 2d ——, 2d Cir. 1970 Docket No. 34404).

Finally, the claim of ineffective assistance of counsel must be weighed in the light of the People's case. *U.S. ex rel. Marcelin* v. *Mancusi*, 462 F. 2d 36, 43 (2d Cir. 1972). The prosecution's case against petitioner was exceptionally strong. In addition to his own admissions, there was the testimony of Banks and Dorothy Green, both of whom testified to other admissions by the petitioner. Against the weight of this testimony, petitioner's argument of ineffective counsel pales. Significantly, petitioner apparently lost confidence in Mr. Cohn who advised him to plead guilty (he also apparently lost confidence in Brown because of this).

Two experienced and competent counsel gave the defendant their best professional advice in view of all the objective circumstances and obstacles they knew faced them. This advice Wooden disliked and a reading of the record compels the conclusion that if counsel did not agree with him, they suddenly became incompetent or allegedly caused him to lose confidence or trust in the relationship. However, this was the type of advice it was the duty of counsel to give, and contrary to establishing ineffective assistance, establishes that counsel was exploring all

options and doing the best for petitioner that was possible under the circumstances.

Insofar as petitioner argues that because he proceeded *pro se* his trial was replete with errors, it is he alone who must bear the burden of his decision to represent himself. Appellant's Brief p. 63. In any event the errors about which petitioner claims were upon analysis, no errors at all. The jury and/defendant were apprised of all the relevant facts concerning Leitha Smith, Betty Mack and the Banks' plea. The trial court granted defendant necessary time to prepare his case under the circumstances, and required the presence of both Mr. Cohn and Mr. Brown at trial to assist the defendant in every way.

Moreover, insofar as Banks testified to the fact that Willie Smith and Caesar Hill had told him the petitioner (Woodie) had shot a man, this statement devotailed with petitioner's own statement in Banks' presence that he had shot at the man (639). In any event, the jury was instructed that whatever Smith and Hill said was not binding on Wooden.

As for Lieutenant Guido's testimony concerning his conversation with Wooden prior to Wooden's admissions, at the station house, Guido never stated that Hill and Smith had accused the defendant of doing the shootings, he was merely relating what he had said to the defendant. This was not testimony offered for the truth thereof between the witness on the stand and a third party. Guido was physically present testifying in the Court Room available for cross-examination as to what he said to the defendant and what the defendant said to him. Moreover, the court gave suitable limiting instruction. (783). Finally, since the trial of the various defendants had been severed, petitioner was free to call Hill and Smith as witnesses if he so desired.

In short, petitioner received a fair trial, it was his decision to represent himself and the claims he is urging here are without merit.

CONCLUSION

The order of the District Court should be affirmed.

Dated: New York, New York, September 30, 1974.

Respectfully submitted,

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United States Court of Appeals

SECOND CIRCUIT

Docket No. 74-2042

UNITED STATES OF AMERICA *ex rel.* WILLIAM WOODEN,

Petitioner-Appellant,

against

LEON J. VINCENT, Superintendent Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at

That on 9/30/70, he served 3 copies of Brief

on Madame Spezz
73 Main St
Hempstead NY 11550

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Esposito

Sworn to before me this
30 day of Sept, 1974

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1975